(6)

No. 94-859

FILED
FEB 21 1995
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF INTERIOR, *et al.*,
*Petitioners*,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
*Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

## *AMICUS CURIAE* BRIEF OF NATIONAL WILDLIFE FEDERATION, TROUT UNLIMITED, SIERRA CLUB, WESTERN ANCIENT FOREST CAMPAIGN, DEFENDERS OF WILDLIFE, THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, NATIONAL AUDUBON SOCIETY, PILCHUCK AUDUBON SOCIETY, PORTLAND AUDUBON SOCIETY, SEATTLE AUDUBON SOCIETY, HEADWATERS, THE MOUNTAINEERS, WASHINGTON ENVIRONMENTAL COUNCIL, AND OREGON NATURAL RESOURCES COUNCIL IN SUPPORT OF REVERSAL

PATTI A. GOLDMAN
*Counsel of Record*
LAURA S. ZIEMER
TODD D. TRUE
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340

JOHN F. KOSTYACK
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036
(202) 797-6879

*Attorneys for Amici Curiae*

*CASILLAS PRESS INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036*

BEST AVAILABLE COPY

38pp

## TABLE OF CONTENTS

Page

INTRODUCTION ..... 1

INTERESTS OF AMICI ..... 2

BACKGROUND ..... 2

A. *Overview of the ESA* ..... 2

B. *The ESA Definition of "Take"* ..... 5

C. *The Harm Regulation* ..... 6

D. *The 1982 ESA Amendments Allowing Incidental Takings* ..... 9

E. *Enforcement of the Harm Regulation* ..... 13

SUMMARY OF ARGUMENT ..... 17

ARGUMENT ..... 18

I. THE ESA'S "TAKE" DEFINITION DOES NOT, ON ITS FACE, PRECLUDE THE HARM REGULATION ..... 18

II. THE HARM REGULATION IS PERFECTLY CONSISTENT WITH THE ESA'S MULTI-FACETED APPROACH TO SPECIES PROTECTION ..... 24

III. THE ESA STRIKES A WORKABLE BALANCE BETWEEN HABITAT CONSERVATION AND OTHER LAND USES ..... 27

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

CASES — Page

*American Bald Eagle v. Bhatti*,
9 F.3d 163 (1st Cir. 1993).....15, 17

*Brown v. Gardner*,
_____ U.S. _____, 115 S. Ct. 552 (1994)..... 19, 20

*Defenders of Wildlife v. EPA*,
882 F.2d 1294 (8th Cir. 1989).....14, 15, 21, 26

*Dole v. United Steelworkers of America*,
494 U.S. 26 (1990).....19

*Friends of Endangered Species, Inc. v. Jantzen*,
760 F.2d 976 (9th Cir. 1985); *affirming*,
596 F. Supp. 518 (N.D. Cal. 1984);
589 F. Supp. 113 (N.D. Cal. 1983).....13

*Jarecki v. G.D. Searle & Co.*,
367 U.S. 303 (1961).....19

*Massachusetts v. Morash*,
490 U.S. 107 (1989).....19

*Morrill v. Lujan*,
802 F. Supp. 424 (S.D. Ala. 1992).....15

*Mountain States Telephone & Telephone v. Pueblo of Santa Ana*, 472 U.S. 237 (1985).....24

*National Muffler Dealers Association, Inc. v. United States*, 440 U.S. 472 (1979).....19

*National Wildlife Federation v. Burlington Northern R.R., Inc.*,
23 F.3d 1508 (9th Cir. 1994).....15, 21

Page

*National Wildlife Federation v. Hodel*,
No. S-85-0837, 1985 WL 186,671 (E.D. Cal.
Aug. 26, 1985).....14, 15, 21, 26

*National Wildlife Federation v. National Park Service*,
669 F. Supp. 384 (D. Wyo. 1987).....15, 17

*Neal v. Clark*,
95 U.S. 704 (1877).....20

*Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979).....8
*affirmed*, 639 F.2d 495 (9th Cir. 1981).....8, 14, 16

*Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988).....14, 16

*Pyramid Lake Paiute Tribe v. Department of the Navy*,
898 F.2d 1410 (9th Cir. 1990).....14, 15

*Schreiber v. Burlington Northern, Inc.*,
472 U.S. 1 (1985).....19, 20

*Securities Industry Association v. Board of Governors*,
468 U.S. 207 (1984).....19

*Sierra Club v. Yeutter*,
926 F.2d 429 (5th Cir. 1991).....14, 16

*Strong v. United States*,
5 F.3d 905 (5th Cir. 1993) (per curiam).....22

*Swan View Coalition, Inc. v. Turner*,
824 F. Supp. 923 (D. Mont. 1992).....14, 15

Page

*Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993)*.....*4, 18*
*reversed on rehearing*, 17 F.3d 1463, *rehearing en banc denied*, 30 F.3d 190 (D.C. Cir. 1994).....12, 18, 20, 22

*Tennessee Valley Authority v. Hill*, *437* U.S. 153 (1978).....3, 8, ,9, 14, 16

*Third National Bank v. Impac Ltd.*, 432 U.S. 312 (1977).....19

*United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D. Cal. 1978), *affirmed*, 578 F.2d 259 (9th Cir. 1978).....21

*United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).....21

*United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992).....14, 15

*United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994).....16, 22

*United States v. Rollins*, 706 F. Supp. 742 (D. Idaho 1989).....16

**STATUTES**

Migratory Bird Treaty Act, 16 U.S.C. § 703.....16, 21

Page

Marine Mammal Protection Act,
16 U.S.C. § 1362(13) ..... 22
16 U.S.C. § 1372(a)(1) ..... 16
16 U.S.C. § 1372(a)(2)(A) ..... 16

Endangered Species Act,
16 U.S.C. § 1531(a)(1) ..... 3
16 U.S.C. § 1531(b) ..... 3
16 U.S.C. § 1531(c) ..... 24
16 U.S.C. § 1532(3) ..... 4
16 U.S.C. § 1532(5)(A) ..... 4
16 U.S.C. § 1532(6) ..... 3
16 U.S.C. § 1532(13) ..... 4
16 U.S.C. § 1532(19) ..... 5, 18, 20
16 U.S.C. § 1532(20) ..... 3
16 U.S.C. § 1533(a)(1)(A) ..... 3
16 U.S.C. § 1533(d) ..... 25
16 U.S.C. § 1533(f) ..... 24
16 U.S.C. § 1534(a) ..... 25
16 U.S.C. § 1535(c) ..... 24
16 U.S.C. § 1536(a)(1) ..... 24
16 U.S.C. § 1536(a)(2) ..... *passim*
16 U.S.C. § 1536(a)(3) ..... 10
16 U.S.C. § 1536(b)(4) ..... 10
16 U.S.C. § 1536(b)(4)(iv) ..... 10
16 U.S.C. § 1536(o)(2) ..... 10
16 U.S.C. § 1538(a)(1) ..... 11
16 U.S.C. § 1538(a)(1)(A) ..... 4
16 U.S.C. § 1538(a)(1)(B) ..... *passim*
16 U.S.C. § 1538(a)(1)(D) ..... 4
16 U.S.C. § 1538(a)(1)(G) ..... 4, 25
16 U.S.C. § 1538(a)(2)(B) ..... 4
16 U.S.C. § 1539(a) ..... 10
16 U.S.C. § 1539(a)(2)(A) ..... 11
16 U.S.C. § 1539(a)(2)(B) ..... 11
16 U.S.C. § 1540(a) ..... 5
16 U.S.C. § 1540(b) ..... 5

Page

16 U.S.C. § 1540(e) ..... 4
16 U.S.C. § 1540(g) ..... 4
16 U.S.C. § 1540(g)(1)(A) ..... 4

**REGULATIONS**

50 C.F.R. § 17.11 ..... 26

50 C.F.R. § 17.21(c)(1) ..... 4

50 C.F.R. § 17.31(a) ..... 4

50 C.F.R. § 17.3 ..... 1, 7, 9, 23

**REGULATORY MATERIALS**

40 Fed. Reg. 28,712 (July 8, 1975) ..... 6

40 Fed. Reg. 44,412 (Sept. 26, 1975) ..... 7

46 Fed. Reg. 29,490 (June 2, 1981) ..... 7, 8

46 Fed. Reg. 54,748 (Nov. 4, 1981) ..... 8, 9

**LEGISLATIVE MATERIALS**

119 Cong. Rec. 25,683 (1973) ..... 5, 6, 24

*Endangered Species Act of 1973: Hearings Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries*, 97th Cong., 2d Sess. (1982) ..... 9, 12

H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860 ..... 11, 13

H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484 ..... 23

Page

H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973).....3, 6, 22, 23, 25

H.R. Rep. No. 567, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807.....11

H.R. Rep. No. 1625, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453..... 10

Pub. L. No. 95-632, 92 Stat. 3751 (1978).....9-10

S. Rep. No. 307, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989.....3, 6, 18, 23

S. Rep. No. 418, 97th Cong., 2d Sess. (1982).....13

S. 1592, 93d Cong., 1st Sess. (1973).....5

S. 1983, 93d Cong., 1st Sess. (1973).....5

**MISCELLANEOUS**

General Accounting Office, *Species Protection on Nonfederal Lands* (1995).....14, 26, 29

T. Beatley, *Habitat Conservation Planning: Endangered Species & Urban Growth* (1994).....27, 28

*The Random House Dictionary of the English Language* (2d ed. 1987).....18

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

---

No. 94-859

---

BRUCE BABBITT, SECRETARY OF INTERIOR, *et al.*,
*Petitioners,*

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia**

---

## BRIEF *AMICUS CURIAE* IN SUPPORT OF REVERSAL

---

## INTRODUCTION

This case presents a facial challenge to a longstanding regulation that defines "harm," as it is used in the Endangered Species Act (ESA or Act), to include "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3. Although the regulation has been in existence for two decades, it has been enforced infrequently, particularly with respect to private activities on private lands. The courts steadfastly have refused to find violations of the regulation without evidence that the habitat destruction could be linked causally to actual wildlife injuries or deaths. Rather than challenge a particular application of the regulation for going beyond the permissible bounds of the statute, respondents have mounted a wholesale attack on the regulation, postulating constructions of its terms that defy the regulation's narrow language.

To strike down the regulation, the court below engaged in contorted linguistic exercises and placed undue reliance on floor statements of individual Members of Congress and congressional testimony of a proponent of a particular legislative proposal. What emerged is not the plain meaning of the statute, but the court's choice of a preferred method of protecting wildlife. This result upsets Congress's multi-faceted approach to species protection in blatant disregard of the proper role for the judiciary in construing statutes.

## INTERESTS OF AMICI

The *amici* are environmental organizations involved in the development, implementation, monitoring, and enforcement of the ESA. Their extensive and far-reaching experience with the Act may assist the Court in understanding how the ESA operates in practice to protect endangered and threatened species without imposing undue burdens on private landowners.[1]

## BACKGROUND

To understand how the regulation defining "harm" furthers Congress's design in the ESA, it is necessary to review the ESA's language and structure, the regulation at issue, statutory amendments to reduce the regulation's burdens on private landowners, and judicial constructions of the regulation.

### *A. Overview of the ESA*

In 1973, Congress enacted the ESA to respond to the mounting concern that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1).

---

[1]The parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

In developing the ESA, Congress identified "[t]he two major causes of extinction [as] hunting and destruction of natural habitat." S. Rep. No. 307, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990. "Of these twin threats, Congress was informed that the greatest was destruction of natural habitats . . .." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 179 (1978).

To address these concerns, the ESA expanded significantly on earlier federal laws that focused on preserving endangered species. *See* H.R. Rep. No. 412, 93d Cong., 1st Sess. 1-5 (1973). The ESA goes further "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . .." 16 U.S.C. § 1531(b). The result, as this Court observed in *TVA v. Hill*, 437 U.S. at 180, 184, is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," which demonstrates Congress's plain intent "to halt and reverse the trend toward species extinction, whatever the cost."

The ESA protects endangered and threatened species and their habitats in a number of ways.[2] Of particular importance here are the ESA's two prohibitions of activities that adversely affect listed species and their habitats.

First, section 7 directs each federal agency to ensure that "any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary [] to be critical . . .."

---

[2]A species is endangered, when it is in danger of extinction throughout a significant portion of its range, and it is threatened, if it is likely to become endangered in the foreseeable future. 16 U.S.C. § 1532(6), (20). In making listing decisions, the Secretary must consider "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." *Id.* § 1533(a)(1)(A).

16 U.S.C. § 1536(a)(2).[3] This mandate requires federal agencies to consult with either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service, the two expert wildlife agencies charged with administering the Act. It also imposes a substantive duty on federal agencies to ensure that their actions will neither jeopardize the continued existence of listed species nor destroy or adversely modify their designated critical habitat.

Second, section 9 makes it illegal to "take" an endangered species of fish or wildlife within the United States or its territorial seas. *Id.* § 1538(a)(1)(B).[4] By regulation, the "take" prohibition applies to threatened species as well. 50 C.F.R. §§ 17.21(c)(1); 17.31(a).[5] The "take" prohibition applies to all "persons" within the jurisdiction of the United States. Since the Act defines "person" to include governmental entities at all levels, 16 U.S.C. § 1532(13), federal agencies, private individuals, and other nonfederal entities are all covered by section 9's proscriptions.

The ESA authorizes lawsuits by the federal government and private parties to enjoin violations of the ESA and its implementing regulations. *Id.* § 1540(e) & (g)(1)(A). Citizen suits, including those seeking to restrict "takes," are limited to injunctive relief. *Id.* § 1540(g). The federal government may

---

[3]Critical habitat is defined as the specific area determined by the Secretary to be essential to the conservation of the species, which may require special protection. *Id.* § 1532(5)(A). "Conservation," in turn, includes all measures necessary for recovery of the species and delisting. *Id.* § 1532(3).

[4]The "take" prohibition does not extend to plants, but rather is limited to fish and wildlife. *See Id.* § 1538(2)(B) (establishing more limited prohibitions for endangered plants). In addition, section 9 lists other prohibited acts, such as the import or export of endangered species, possession of unlawfully taken species, and violations of regulations promulgated pursuant to the ESA. *Id.* § 1538(a)(1)(A), (D) & (G).

[5]This case unsuccessfully challenged the regulation that brings threatened species within section 9. 1 F.3d 1 (D.C. Cir. 1993). That issue is not before this Court.

also bring civil and criminal penalty proceedings, but a knowing violation of the ESA is required for civil fines of $500 or more and for all criminal penalties. *Id.* § 1540(a)-(b).

*B. The ESA Definition of "Take"*

The ESA contains the broadest "take" prohibition of any federal wildlife statute. It defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). None of these terms is defined in the statute.

The origin of the precise language of the ESA "take" definition is somewhat of a mystery. In 1973, a subcommittee of the Senate Commerce Committee considered two bills: S. 1592 and S. 1983, 93d Cong., 1st Sess. (1973). S. 1592 would have included all the words of the present ESA take definition except the two broadest words: "harm" and "harass." S. 1983, also lacked the word "harm," but had a broader definition of "take." In addition to "hunt," "capture," and "kill," its "take" definition included three additional terms: "threaten," "harass," and "the destruction, modification, or curtailment of [a species'] habitat or range." *See* S. 1983, *supra*, at § 6(A). This last phrase would make any type of habitat modification a "take," even if it had no detrimental effect on a species.

The "take" definition reported out of the Senate Commerce Committee was an amalgamation of the two bills, containing all the words in the S. 1592 definition, plus the broader "harass" prohibition from S. 1983. *See* S. 1983, *supra*, at § 3(12). The Senate Commerce Committee report provides no clue as to why the committee rejected the narrower "take" definition in S. 1592, or why it modified the definition in S. 1983 to omit the explicit reference to habitat modification.

The Senate added the word "harm" to the "take" definition in an amendment offered on the Senate floor. 119 Cong. Rec. 25,683 (1973) (Sen. Tunney). Although called a clarify-

ing and technical amendment, its sponsor, who was also the floor manager, stressed that the amendment was "important" because it "will help to achieve the purposes of the bill and will clarify some confusion caused by language remaining in the bill from earlier drafts or omitted from earlier drafts which went unnoticed during the final committee markup." *Id.* This amendment makes it impossible to draw any inference from the prior omission of habitat modification from the "take" definition because the addition of "harm" brought back some of the breadth of that concept.

The Senate committee report addressing the ESA's full "take" definition, even before the addition of the word "harm," states:

> "Take" is defined . . . in the broadest possible manner to include every conceivable way in which a person can "take" or attempt to "take" any fish or wildlife.

S. Rep. No. 307, *supra*, at 14, *reprinted in* 1973 U.S.C.C.A.N. at 2995. The only other report language on the definition of "take" explicitly states that the word "harass" encompasses unintentional acts. It also clarifies that the word "harass" allows the Secretary "to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it more difficult for them to hatch and raise their young." H.R. Rep. No. 412, *supra*, at 11.

*C. The Harm Regulation*

In 1975, FWS began a rulemaking proceeding to define "take" to prohibit certain types of habitat degradation. Initially, FWS proposed a definition of the word "harass" to accomplish this goal. 40 Fed. Reg. 28,712, 28,714 (July 8, 1975). In the final rule, FWS modified its proposed definition of "harass" to cover only:

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

40 Fed. Reg. 44,412, 44,413 (Sept. 26, 1975); 50 C.F.R. § 17.3. This regulation has not been challenged in this case.

The 1975 FWS final rule also added, for the first time, a definition of "harm" to deal more fully with habitat degradation:

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm."

40 Fed. Reg. at 44,416. The discussion accompanying the final rule explained that "potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife. The actual consequences of such an action upon a listed species is [sic] paramount." 40 Fed. Reg. at 44,413. According to FWS, such "environmental restrictions represent a reasonable response to the habitat needs of listed species," and they further the express ESA goal of conserving ecosystems on which listed species depend. *Id.*

From 1975 to 19 81, no federal agency initiated any actions to enforce the "harm" regulation. 46 Fed. Reg. 29, 490, 29, 491 (June 2, 1981). However, a private action invoked the regulation in a challenge to a Hawaiian wildlife agency's maintenance of feral sheep and goats for sport hunting in the habitat of the endangered Palila bird. The district court found that the

herds were feeding on and preventing regeneration of the plants needed by the Palila for survival, and that this was, in turn, leading to a population decline of the endangered Palila. *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979). The Ninth Circuit affirmed, concluding that allowing the sheep and goat herds in the Palila's sole remaining habitat constituted a "taking" of the Palila under the ESA, particularly in light of scientific expert opinion that elimination of the sheep and goats was necessary to allow the forest to regenerate and sustain the remaining Palilas. 639 F.2d 495, 497-98 (9th Cir. 1981).[6]

Although no one questioned the validity of the regulation in *Palila*, FWS responded by proposing to redefine "harm" to clarify that mere habitat modification without injury to wildlife is not a "take" under the ESA. 46 Fed. Reg. 29,490 (June 2, 1981). The proposed change was precipitated by a Department of Interior legal memorandum expressing the concern that the existing regulation could be construed under the *Palila* decision to prohibit habitat modifications that would not detrimentally affect listed species. Associate Solicitor Opinion (April 17, 1981), ***reprinted in*** 46 Fed. Reg. at 29,490-92.

The 1981 proposed rule would have redefined "harm" as "an act which injures or kills wildlife" and would have eliminated altogether any reference to habitat modification. *Id.* at 24,490. Many comments opposed this modification, believing that it would require a direct physical injury to an individual member of the wildlife species and would preclude finding a "take" based on habitat degradation, even where endangered species are injured or killed as a result. 46 Fed. Reg. 54,748 (Nov. 4, 1981).

---

[6]This Court cited the harm regulation in *TVA v. Hill*. In observing that opening the floodgates of the Tellico Dam would destroy the snail darter's entire habitat, then Chief Justice Burger wrote: "[w]e do not understand how TVA intends to operate Tellico Dam without 'harming' the snail darter." 437 U.S. at 184 n.30.

In the 1981 final rule, FWS added the following clarifying phrase to the proposed "harm" definition:

> Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patters, including breeding, feeding or sheltering.

50 C.F.R. § 17.3. In explaining this change, FWS stressed that its proposed definition was not intended to exclude "significant habitat destruction which could be shown to injure protected wildlife through the impairment of its essential behavioral patterns." 46 Fed. Reg. at 54,748. According to FWS, "Congress made its intent to protect species and their habitat very clear. It did not, however, express any intention to protect habitat under section 9 where there was no appurtenant showing of death or injury to a protected species." *Id.* at 54,749. Moreover, FWS expressly disavowed any intent to "limit [ ] 'harm' to direct physical injury to an individual member of the wildlife species." *Id.* at 54,748. The harm regulation has not changed since 1981.

*D. The 1982 ESA Amendments Allowing Incidental Takings*

Although the reach of the harm regulation was discussed extensively in the 1982 ESA congressional hearings, particularly as it had been applied to private development, no amendments to section 9 or the "take" definition made it out of committee in either House. *See Endangered Species Act of 1973: Hearings Before the Subcomm. on Fisheries & Wildlife Conservation & the Environment of the House Comm. on Merchant Marine & Fisheries*, 97th Cong., 2d Sess. 290-294, 325-26, 329, 342-46, 357-60, 426-28 (1982) (*Hearings*). Instead, the 1982 amendments, like their predecessors, left the ESA's basic mandates intact, while creating more flexibility in certain applications of those provisions.[7]

---

[7]This is in keeping with the pattern Congress has followed ever since it considered amending the Act in the wake of *TVA v. Hill*. *See* Pub. L.

The 1982 amendments created processes whereby both federal agencies and nonfederal entities may obtain permission to "take" a listed species in the course of an otherwise lawful activity. 16 U.S.C. §§ 1536(b)(4), 1539(a). The federal incidental take process is woven into the section 7(a)(2) consultation process. After determining that an action will not violate section 7(a)(2), FWS may permit the taking of an endangered or threatened species that is incidental to that action, subject to reasonable and prudent measures to minimize the adverse impact on the species. *Id.* § 1536(b)(4). An incidental take statement provides a safe haven, eliminating section 9 liability for "takings" that occur pursuant to it. *Id.* § 1536(o)(2).

A private applicant for a federal permit or license may also initiate a section 7 consultation, where the proposed action is likely to affect an endangered or threatened species. *Id.* § 1536(a)(3). The private actor would then be insulated from section 9 "take" liability by the incidental take statement issued through consultation. *Id.* § 1536(a)(3), (b)(4)(iv), (o)(2). In other words, the section 7 incidental take statement reaches beyond federal agencies to cover private activities that require federal permitting, licensing, or funding.

Congress did not, however, limit incidental take protection to private activities that receive federal licenses or funds:

> There are situations where the unintentional taking may occur on private lands owned by a developer who has no need of a Federal permit. These in-

---

No. 95-632, §§ 3, 11(7), 92 Stat. 3751, 3753-59, 3766 (1978) (creating section 7 exemption process and requiring consideration of economic impacts in designation of critical habitat); H.R. Rep. No. 1625, 95th Cong., 2d Sess. 14 (1978), ***reprinted in*** 1978 U.S.C.C.A.N. 9453, 9464 (amendments "attempt [ ] to retain the basic integrity of the Endangered Species Act, while introducing some flexibility which will permit exemptions from the Act's stringent requirements").

> dividuals have no access to the consultation and exemption provisions of the Act since they do not apply for any Federal permit or license to conduct their activities but, nevertheless, they are subject to the taking prohibitions of Section 9.

*See* H.R. Rep. No. 567, 97th Cong., 2d Sess. 15, 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2815, 2824. Accordingly, Congress established a parallel incidental take permit process for activities with no federal nexus. *Id.*

Under ESA section 10, a nonfederal entity seeking an incidental take permit must submit a conservation plan that specifies steps the applicant will take to minimize and mitigate impacts of the action on listed species. 16 U.S.C. § 1539(a)(2)(A). The Secretary may issue an incidental take permit upon finding that the take will be incidental; the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking; the conservation plan will be adequately funded; and "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *Id.* § 1539(a)(2)(B). Under this last factor, a conservation plan must protect habitat when the species' survival depends on it. By writing this requirement into section 10, Congress evinced its intent that nonfederal entities obtaining incidental take permits would be required to minimize many types of adverse habitat modifications barred by the "harm" regulation. As under section 7, a section 10 incidental take permit provides a safe haven, insulating takings from section 9 liability if they are within the scope of the permit. *Id.* § 1538(a)(1).

The Joint Explanatory Statement of the Committee on Conference repeatedly refers to habitat conservation as the purpose of the section 10(a) process. H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 29-32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2870-73. Indeed, it identifies no other purpose for section 10(a). Although one federal licensee testi-

fied in a congressional hearing about a taking that did not involve habitat destruction, those concerns did not make their way into the conference report. *See Hearings* at 358-59 (John Cagnetta, Northeast Nuclear Energy Company).[8] Instead, the conferees focused exclusively and extensively on devising a means of allowing some habitat modification "takings" to go forward without running afoul of the Act.

The conference report is very specific on this score. It states, without qualification, that the incidental take permit process was

> modeled after a habitat conservation plan that has been adopted by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species . . . within the San Bruno Mountain Area of San Mateo County.
>
> This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and habitat conservation.
>
> The terms of this provision require a unique partnership between the public and private sectors in the interest of species and habitat conservation.
>
> Because the San Bruno Mountain plan is the model for this long term permit and because the adequacy of similar conservation plans should be measured

[8]That witness discussed take liability for sturgeon eggs entrapped in a nuclear power plant water intake structure. *Id.* As a federal licensee, however, the company sought to be insulated from section 9 liability upon conclusion of a section 7 consultation. As such, this testimony had nothing to do with the section 10 incidental take permit process, contrary to the conclusion of the court below. *See* 17 F.3d at 1467-68.

> against the San Bruno plan, the committee believes that the elements of this plan should be clearly understood. Large portions of the habitat on San Bruno Mountain are privately owned. Prior to the discovery of two species of endangered butterflies, the landowner planned to develop much of its land. The butterflies face threats to their existence, however, even in the absence of any development. The primary threats to the species consist of insufficient regulation of recreational activities and encroachment on the species' habitat by brush and exotic species.

H.R. Conf. Rep. No. 835, *supra*, at 30-32; *reprinted in* 1982 U.S.C.C.A.N. at 2871-73.

The Senate report further elaborates that the San Bruno habitat conservation plan had been created to minimize the "take" of endangered butterflies that would be caused by the bulldozing of the butterflies' habitat in the course of "the development of some 3000 dwelling units." S. Rep. No. 418, 97th Cong., 2d Sess. 10 (1982). It added that incidental take permits "should lead to resolution of potential conflicts between endangered species and the actions of private developers, while at the same time encouraging these developers to become more actively involved in the conservation of these species." *Id.*[9]

### *E. Enforcement of the Harm Regulation*

Despite the existence of the harm regulation for nearly two decades, remarkably few cases have been brought to enforce

---

[9]Shortly after enactment of the 1982 amendments, the Fish and Wildlife Service issued an incidental take permit for the San Bruno habitat conservation plan, and the permit withstood challenge. The reported decisions further demonstrate that the only type of "take" precipitating the San Bruno plan was indirect injury resulting from habitat modification in the course of commercial development. ***Friends of Endangered Species, Inc. v. Jantzen***, 760 F.2d 976 (9th Cir. 1985); ***affirming***, 596 F. Supp. 518 (N.D. Cal. 1984); 589 F. Supp. 113 (N.D. Cal. 1983).

it. Criminal prosecutions for habitat destruction have been exceedingly rare. General Accounting Office, *Species Protection on Nonfederal Lands* 13 (1995). In addition, the federal government has brought very few civil actions seeking to prohibit habitat modification from going forward without developing mitigation measures through the incidental take process. *See, e.g., United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992) (salmon kills from pumping water from river with inadequate fish screen). Although several citizen suits have been brought to restrict destructive habitat modifications, the total number of reported cases is less than fifteen. *See infra* at 14-15 & nn. 10-11.

Moreover, although the tenor of this case suggests that the harm regulation has impaired effective land use by private parties, the few instances of judicial intervention suggest otherwise. By far, most actions seeking to restrict habitat modification have been brought against governmental entities. The federal government has been sued most often.[10] State and local governments are next.[11] Both of the reported citizen suit en-

---

[10]*TVA v. Hill*, 437 U.S. 153 (federal authority's operation of federally funded dam); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (Forest Service logging program in red-cockaded woodpecker habitat); *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410 (9th Cir. 1990) (Navy's outlease program authorizing water draws from Pyramid Lake); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (EPA's registration of pesticide uses that caused deaths of endangered species); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923 (D. Mont. 1992) (Forest Service road densities affecting gray wolf and grizzly bears); *National Wildlife Fed'n v. Hodel*, No. S-85-0837, 1985 WL 186,671 (E.D. Cal. Aug. 26, 1985) (federal elk hunting season causing deaths of bald eagles who consumed lead shot).

[11]*Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 852 F.2d 1106 (9th Cir. 1988) (maintenance of mouflon sheep for hunting by Hawaii agency); *Palila I*, 639 F.2d 495 (maintenance of feral sheep and goat herds for hunting by Hawaii agency); *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993) (Massachusetts agency's authorization of

forcement actions brought against private entities to stop habitat destruction were unsuccessful: one because a "take" could not be proven, *see Morrill v. Lujan*, 802 F. Supp. 42[4] (S.D. Ala. 1992), and the other because remedial measures had prevented the recurrence of the taking, *see National Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508 (9th Cir. 1994). Moreover, no court has ever found that the harm regulation has caused a Fifth Amendment taking of private property.

The reason that so few ESA "take" enforcement actions have been successful is that the courts have insisted, as required by the harm regulation, that the challenged action actually cause injury or death to endangered or threatened species.[12] The courts have steadfastly refused to find a "take" based solely on evidence that habitat, even critical habitat, of an endangered or threatened species has been or will be destroyed. *See, e.g., Morrill v. Lujan*, 802 F. Supp. at 430 (destruction of suitable habitat does not, alone, constitute "take").

---

deer hunt using lead slugs challenged for presenting risk of poisoning to bald eagles); *see also United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 (federal challenge to regional water district's taking of endangered salmon in pumping water from river).

[12]*Compare, e.g., Defenders of Wildlife v. EPA*, 882 F.2d at 1301 (endangered species died from ingesting pesticide); *and National Wildlife Fed'n v. Hodel*, 1985 WL 186,671 (96 bald eagles died from ingesting lead shot from authorized hunt); *with American Bald Eagle v. Bhatti*, 9 F.3d at 165-66 (no evidence bald eagles consumed lead slugs from deer hunt); *and National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. at 389 (no evidence of bear mortalities from operation of campground). The courts have also required demonstration of a causal link between the challenged action and harm to imperiled wildlife. *See Pyramid Lake*, 898 F.2d at 1420 (species decline could not be linked to particular water withdrawals at issue); *Swan View Coalition*, 824 F. Supp. at 940 (plaintiffs must link species decline or other injuries to challenged road densities).

In the few habitat modification cases resulting in injunctions, drastic consequences would have followed if the challenged actions were allowed to proceed. In the two *Palila* cases, animal herds introduced and maintained by the state for hunting purposes were destroying the entire remaining habitat for the severely endangered Palila. The court concluded that allowing the herds to continue destroying the habitat would eliminate the Palila's food source and cause the extinction of the Palila. *Palila II*, 852 F.2d at 1109-10; *Palila I*, 639 F.2d at 497. Similarly, *in TVA v. Hill*, 437 U.S. at 184 n.30, opening the floodgates of the Tellico Dam would destroy the sole habitat of the snail darter. Likewise, *Sierra Club v. Yeutter*, 926 F.2d at 437-39 & n.11, 16, raised the likelihood of extinction of red-cockaded woodpecker populations, which had declined precipitously (by more than 50%) as a result of the Forest Service's logging practices, and which would face extinction without modifications to those practices.

Thus far, the courts have found workable standards in the harm regulation to determine whether an act of habitat destruction has harmed and thus taken a protected species. Nonetheless, during the course of this case, respondents have asked the courts below to issue an advisory opinion on issues that may arise in applications of the harm regulation, such as whether individual animal deaths are required to find a "take." *See* D.C. Cir. Reply Br. at 10-11.[13] Given the range of contexts in which a "take" may occur — from a knowing destruction of a nest to pesticide poisonings to destruction of the last remaining habitat for a species, resolution of these questions should be left to specific cases.

---

[13]Respondents also raise the specter of an individual going to jail for normal land management activities. Of course, that has never happened under the harm regulation. Moreover, any issues that might arise if such a prosecution were brought, should be resolved in a concrete case, rather than in a facial challenge. *See United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994) (criminal "take" prosecution under Marine Mammal Protection Act, 16 U.S.C. § 1372(a)(1)-(2)(A)); *United States v. Rollins*, 706 F. Supp. 742 (D. Idaho 1989) (criminal "take" prosecution under Migratory Bird Treaty Act, 16 U.S.C. § 703).

## SUMMARY OF ARGUMENT

This facial challenge to a key component of the ESA invites this Court to sit as a superlegislature and restrike the balance Congress has developed over the years in writing and amending the ESA. The plain meaning of the "take" definition supports the harm regulation, as does the structure of the Act, particularly in light of the incidental take processes added in 1982. The Court should end its inquiry here and refrain from contorting the words of the "take" definition to eliminate some broad hypothetical application of its terms. Such judicial restraint is particularly in order because Congress expressly designed the ESA "take" definition to encompass every conceivable way wildlife may be taken, and it did so, in part, by specifically adding the word "harm" to the "take" definition.

The harm regulation fits comfortably within the ESA's multifaceted approach to species protection. Nothing in the ESA or its legislative history indicates that Congress intended one ESA provision, such as its land acquisition authorization, to be the exclusive tool for addressing a particular risk to listed species. Any contrary reading rests on isolated statements of individual Members of Congress and a fundamental misunderstanding of how the ESA regulates habitat modification on public and private lands.

For twenty years, private and public landowners have adapted their behavior to conform to the harm regulation, without dire consequences. Indeed, no court has ever found a Fifth Amendment taking of private property from operation of the harm regulation. Nor has any court held an application of the harm regulation in a specific enforcement action to be *ultra vires*. In the absence of judicially determinable overreaching, it is the role of Congress and the implementing agencies, not the judiciary, to assess the effect of the regulation and to strike the balance between habitat conservation and other land uses.

## ARGUMENT

### I. THE ESA'S "TAKE" DEFINITION DOES NOT, ON ITS FACE, PRECLUDE THE HARM REGULATION.

The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Without a doubt, the ESA "take" prohibition is the most far-reaching such prohibition on the books, applying to more types of actions and using broader terms than any prior wildlife protection statute.

On its face, this definition ranges from broad prohibitions on harming and harassing endangered species to specific prohibitions on hunting, shooting, trapping, and capturing them. Moreover, when the prohibition on any attempt "to engage in any such conduct" is added, the ESA "take" prohibition has an extremely broad reach. It is, therefore, not surprising that Congress expressed its intent that "take" be defined "in the broadest possible manner to include *every conceivable way* in which a person can "take" or attempt to "take" any fish or wildlife." S. Rep. No. 307, *supra*, at 14, *reprinted in* 1973 U.S.C.C.A.N. at 2995 (emphasis added).

Nothing in the ESA or its legislative history defines the word "harm." The dictionary definition of the verb "harm," generally refers to causing injury, damage, or hurt. *See, e.g., The Random House Dictionary of the English Language* 873 (2d ed. 1987). Throughout this case, no one has disputed that the ordinary meaning of the word "harm" readily encompasses habitat modification that actually kills or injures wildlife. *See* 17 F.3d at 1463 (Judge Williams) ("linguistically possible to read 'harm' as referring to" habitat modification); 1 F.3d 1, 12 (Judge Sentelle, dissenting) (farmer modifying habitat "may be doing something harmful to wildlife, but he is not 'taking' it.") (emphasis added). Unless something else in the language or structure of the ESA forecloses the harm regulation, it is a fair reading of the word "harm."

The court below found such a limitation in the other words in the "take" definition by applying the *noscitur a sociis* canon of statutory construction. This Court has equated the *noscitur* canon with the principle "a word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Under this canon, "words grouped in a list should be given related meaning," but only where such a reading is consistent with the law's other provisions and objectives. *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989) (citation omitted)); *see also Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 322-24 (1977) (*noscitur a sociis* insufficient to define term without full consideration of statute's operation and history).

*Noscitur a sociis* can limit the meaning of an ambiguous word in a statutory list to conform it to the conspicuous common thread running through the other listed words. For example, in *Jarecki*, 367 U.S. at 307, the word "discovery" was limited to mineral discovery, rather than expanded to include inventions, because it was listed together in the statute with "exploration" and "prospecting." Similarly, in *Brown v. Gardner*, ____ U.S. ____, 115 S. Ct. 552, 555 (1994), this Court struck down a regulation limiting benefits to "injuries" resulting from third-party fault because the other terms in the statutory list — "disease" and "other physical or mental defect" — are unquestionably "free from any fault connotation."[14] In each of these cases, once this Court identified

---

[14]*See also Dole v. United Steelworkers of America*, 494 U.S. at 36 (because other listed terms all require collection of information *by* the government, "reporting and recordkeeping requirement" does not include rules requiring employer disclosure to employees); *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985) (because "fraudulent" and "deceptive" require element of nondisclosure, "manipulative' is likewise limited); *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 207, 217-18 (1984) (because all other listed terms describe underwriting activity, "public sale" excludes retail brokerage business); *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 487-88 (1979) ("business league" limited

the conspicuous common element among the listed terms, it was obvious that the challenged application of the disputed term did not fit the statutory model.[15]

In the proceedings in this case, both the court of appeals and respondents have proposed various themes as the common thread running through the "take" definition. The opinion for the court below asserts that the words in the "take" definition "contemplate the perpetrator's direct application of force to the animal" alternatively stated as fitting "the basic model 'A hit B.'" 17 F.3d at 1465. Distancing themselves from this theory, respondents variously contend that the other words in the "take" definition refer to acts: (1) "directed against protected wildlife;" (2) directly (as opposed to indirectly) causing death or injury; or (3) intentionally (as opposed to unintentionally or inadvertently) causing death or injury. Opposition to Petition for Writ of Certiorari, at i, 2, 8-9.

*Noscitur* cannot be invoked to limit the word "harm" to any of these meanings because not all the other words in the "take" definition are so limited. *See Brown*, 115 S. Ct. at 554; *Schreiber*, 472 U.S. at 8. The ESA's "take" definition is comprised of ten words of varying reaches. Some of the words are narrow and fit the above models. *See* 16 U.S.C. § 1532(19) ("hunt, shoot, . . ., trap, capture or collect.")

Others are not susceptible of such narrow meanings. The words "kill" and "wound" do not require that the harmful

---

to organizations that provide industry-wide benefits like "chamber of commerce" and "board of trade"); *Neal v. Clark*, 95 U.S. 704, 708-09 (1877) ("debt created by fraud" limited to intentional bad faith acts where it appears in list with "embezzlement").

[15]None of these cases involved a facial challenge; instead, each arose in the contest of a disputed application of a particular statutory term, which enabled the Court to make a discrete choice between alternative meanings. Here, by contrast, respondents seek to limit the meaning of a broad statutory term without the benefit of a disputed application to illustrate its allegedly unintended breadth.

result occur intentionally or as a result of an act directed against wildlife. Thus, a train that directly hits and kills a grizzly bear "takes" the bear, even though operating the train is neither intended to kill, nor directed at, the bear. *See National Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508. In addition, "kill" and "wound" do not require that an act even *directly* cause death or injury. In *Defenders of Wildlife v. EPA*, 882 F.2d at 1301, the court found that EPA violated the ESA "take" prohibition because it registered (*i.e.*, permitted) certain uses of the pesticide strychnine, and endangered animals ingested the strychnine bait and died when it was used by farmers and ranchers pursuant to the EPA registration. Similarly, in *National Wildlife Fed'n v. Hodel*, 1985 WL 186,671, the court found a "take" because FWS permitted hunting of migratory birds with lead shot, and bald eagles, who consumed the lead shot, died as a result. In these cases, the actions constituted a "take" presumably by virtue of both the harm regulation and the ESA prohibitions on killing or wounding protected species, even though the agencies did not apply force to the animals, did not act directly against wildlife, did not directly cause death or injury, and did not intentionally harm wildlife.[16]

The legislative history, regulatory definition, and plain meaning of the word "harass" also demonstrate that Congress did not intend to limit "take" to any of the models offered by respondents or the court below. First, the House report makes clear that the harassment need not be intentional. H.R. Rep.

---

[16]Even under the narrower "take" prohibition in the Migratory Bird Treaty Act, 16 U.S.C. § 703, which includes the words "pursue, hunt, take, capture, [and] kill," but not "harm," some takings have been found as an unintended and indirect result of habitat modifications. *See, e.g., United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (discharge of toxic pesticides in waste pool killed migratory birds); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978), *appealed & aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (pesticide application killed migratory birds that ingested pesticide).

No. 412, *supra*, at 11. Second, the House report stresses that "harass" includes "the activities of birdwatchers where the effect of those activities might disturb the birds and make it more difficult for them to hatch and raise their young." *Id.* Certainly, this example does not envision that the birdwatchers would apply any force, directly or indirectly, to the birds, and it turns birdwatching on its head to suggest that the birdwatchers would intend to harm the birds.

Third, although the opinion for the court below accepted that "one may under some circumstances 'harass' an animal by aiming sound or light in its direction," it struggled to make this form of harassment fit the direct application of force model by characterizing the sound waves and light particles as "physical forces launched by the perpetrator." 17 F.3d at 1465. The fit between the court's hypothetical and the direct application of force model is tenuous as best; it is nonexistent altogether with respect to respondents' intentional, directed against wildlife, and directly cause harm models.[17]

Fourth, the Secretary of Interior has defined "harass" to mean:

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

---

[17] *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1994), is not to the contrary because the court construed the word "harass" in the "take" prohibition in the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1362(12), which does not contain the word "harm," and it did so in the context of a criminal prosecution. Ironically, *Hayashi* held that an intentional act (firing shots) directed at wildlife (porpoises) to scare them away from a fishing line was not within the MMPA "take" definition. *Compare Strong v. United States* 5 F.3d 905 (5th Cir. 1993) (*per curiam*) (feeding dolphins comes within MMPA "harass" prohibition even though it does not involve the direct application of force or intentional or direct harm to dolphins).

50 C.F.R. § 17.3. This definition encompasses actions, including habitat modifications, that are likely to injure wildlife, but that neither involve the application of force nor directly or intentionally cause harm to wildlife. This regulation, which respondents have not challenged, further highlights that "harass" defies the limiting models put forward by respondents and the court below.[18]

The ESA's "take" definition, its legislative history, and judicial applications of the harm regulation point to a different common denominator among the words in the ESA "take" definition. Each word pertains to acts (or omissions) that detrimentally affect endangered or threatened species. The detrimental effect, rather than the nature of the act, is the linchpin of a section 9 take.

It would defy the sheer breadth of the "take" definition to use the *noscitur* canon to identify any narrower common denominator. First, the ESA "take" definition was intentionally broadened beyond those in prior wildlife statutes, some of which have been read to find takings through certain acts of unintentional habitat degradation. *See supra* at 21 n.16; S. Rep. No. 307, *supra*, at 14, *reprinted in* 1973 U.S.C.C.A.N. at 2995.

Second not only does the word "harm" have no counterpart in any other wildlife statute's take prohibitions, but it also was separately added to the ESA's "take" definition to clarify

---

[18]Respondents' models are further undercut by the 1978 amendment deleting from the ESA civil and criminal penalty provisions the phrase "commits an act which violates." The purpose of this deletion was to clarify that ESA sanctions "apply to violations involving an omission or failure to act as well as to violations involving the commission of a prohibited act." H.R. Conf. Rep. No. 1804, 95th Cong. 2d Sess. 26 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9494. Since the direct application of force would generally not occur through a failure to act, nor would a failure to act be "directed at wildlife," these models exclude whole categories of actions clearly encompassed within the "take" prohibition.

omissions from earlier bills. 119 Cong. Rec. 25,683 (1973). The fact that "harm" was added as a separate amendment undercuts any attempt to narrow it to do no more than the other words defining "take" and thereby render it meaningless.

In this respect, applying *noscitur a sociis* would run afoul of another canon that counsels against interpreting a statute so as to render one part surplusage. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). If "harm" is limited to direct applications of force or intentional or direct killings, it would add nothing to the words "wound," "harass," "pursue," "capture," and "kill." Where Congress has separately added a word, that word should not be made a nullity. Similarly, where Congress has expressed its intent that a provision be given the broadest possible meaning, the presumption against surplusage must win the battle between the canons of construction.

## II. THE HARM REGULATION IS PERFECTLY CONSISTENT WITH THE ESA'S MULTI-FACETED APPROACH TO SPECIES PROTECTION.

The ESA embodies a multi-faceted approach to species protection. Rather than devise one regulatory tool to deal with each specific type of threat to the survival of listed species, the Act creates a full arsenal of tools to be used to stem the tide of extinction.

Thus, once a species has been listed as endangered or threatened, it and its habitat are subject to a range of protections. In addition to sections 7(a)(2) and 9, federal agencies must use their authority to conserve listed species, *id.* §§ 1531(c), 1536(a)(1); the listing agency must develop recovery plans for listed species, *id.* § 1533(f); states may establish (and obtain partial federal funding for) cooperative programs for conserving listed species, *id.* § 1535(c); and certain agencies may

acquire lands to conserve listed species, *id.* § 1534(a). The Secretary may also promulgate regulations necessary to protect imperiled species, which are enforceable under the Act. *Id.* §§ 1533(d); 1538(a)(1)(G).[19] Nothing in the Act specifies circumstances in which one of these protections must be pursued to the exclusion of the others.

More specifically, nothing in the ESA or its legislative history evinces a congressional intent to make land acquisition the *exclusive* means of protecting habitat on private lands. Although congressional committees and individual Members of Congress pointed to land acquisition as an important means of protecting habitat on private lands, none of these statements suggests that land acquisition would be a panacea for imperiled species' habitat needs on nonfederal land. To the contrary, the 1973 House report confirmed that "[c]learly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our civilization," not to mention federal budgets. H.R. Rep. No. 412, *supra*, at 6. It simply reads too much into the fragmented endorsements of land acquisition to make it the exclusive means of protecting habitat on private lands.

The contrary reading urged by respondents misreads sections 7 and 9 in two fundamental respects. First, respondents assume that section 7 reaches habitat degradation but that section 9 does not. However, even without the harm regulation, the words "harass," "kill," and "wound" reach some acts of habitat degradation that injure or kill protected wildlife. *See supra* at 20-23. The requirement that habitat degradation must lead to a detrimental effect to protected species is unique to section 9; the inclusion of some acts of habitat degradation is not.

---

[19]Under this authority, the Secretary could presumably place limitations on habitat degradation that detrimentally affects protected species. Neither repondents nor the court below addressed this independent basis for restricting habitat degradation on public and private lands.

Second, it is inaccurate to pigeonhole federal actions into section 7 and private actions into section 9, as the court below and respondents try to do. Rather, section 7 consultations reach private activities on private lands when they require a federal permit or receive federal funds. Thus, private dioxin discharges into the Columbia River, which impair bald eagle reproductive capabilities, may be authorized by an incidental take statement issued under ESA section 7 for the EPA's promulgation of a dioxin standard under the federal Clean Water Act. *See* FWS Biological Opinion, No. 1-7-92-F-619 (Jan. 6, 1994).

Conversely, section 9 prohibits harmful activities undertaken by federal agencies that fall through the cracks in section 7. For example, federal actions that kill endangered species would violate section 9, but may pass muster under section 7 if the existence of the species would not be jeopardized. In addition, even without the harm regulation, section 9 reaches federal habitat degradation on lands that have not been designated as critical habitat. *See Defenders of Wildlife v. EPA*, 882 F.2d 1294; *National Wildlife Fed'n v. Hodel*, 1985 WL 186,671. Because no critical habitat has been designated for most listed species, section 9 plays a critical role in preventing federal habitat destruction. *See* General Accounting Office, *supra*, at 1 (781 listed species); 50 C.F.R. § 17.11 (only 83 listed species have critical habitat designations).

Accordingly, sections 7 and 9 cannot be neatly divided into federal and private spheres. Both sections apply to federal agencies, and both prohibit habitat destruction on private lands in some circumstances. The overlapping roles of sections 7 and 9 undermine the theory that Congress intended land acquisition to be the sole mechanism for dealing with habitat on private lands.

## III. THE ESA STRIKES A WORKABLE BALANCE BETWEEN HABITAT CONSERVATION AND OTHER LAND USES.

Recognizing that few species need totally undisturbed use of habitat, Congress rightfully assumed that civilization and species protection could coexist. Development and resource extraction activities may need to be modified to facilitate such coexistence. However, because species rarely need totally undisturbed habitat, such modifications are generally quite modest, entailing, for example, a slight relocation of a planned road or sewer pipe, and enabling private and governmental land uses to proceed apace.

Where modifications do not eliminate incidental takings, the ESA, by virtue of its 1982 amendments, allows such takings to occur when measures are taken to minimize the damage. The harm regulation, therefore, does not operate to foreclose private or public land uses. Instead, it fosters compliance with a regulatory process designed to minimize and mitigate the impacts of those activities on endangered and threatened species. What this case seeks is the wholesale elimination of this review and mitigation process, despite the widespread acceptance it has gained over the years. Without such review, a proposed project's destructive impacts on listed species will be unaddressed until after the damage has been done, even when the damage easily could have been avoided.

When coupled with the incidental take permit process, the harm regulation has fostered cooperative strategies between developers, regulators, and environmentalists to conserve species and their habitat. T. Beatley, *Habitat Conservation Planning: Endangered Species & Urban Growth* 24-25 (1994). Habitat conservation plans are developed locally or regionally by those who will live with them. For example, in Kern County, California, state and federal agencies, land developers, oil and gas companies, agricultural interests, and private conservation groups are finalizing a habitat conservation plan to protect the San Joaquin kit fox and other endangered and threat-

ened species. *Id.* at 168-69. The planning process is flexible, leading to the development of plans (often through creative compromises) that are carefully tailored to human needs, species' needs, and the lay of the land. *Id.* at 36.

The purpose of a habitat conservation plan, whether it covers 5 acres or 400 square miles, is to allow private and public land use activities to go forward in a manner that minimizes their harmful effects on endangered and threatened species. Many conservation plan restrictions on private land use operate in much the same way as zoning laws, by designating locations for particular types of development, establishing buffer zones around breeding animals, and specifying maximum building densities. *Id.* at 35. Other provisions are analogous to common land use regulations that require restoration after development or restrict pesticide use in sensitive areas, such as endangered butterfly habitat. *Id.* at 37, 59, 66-67 (San Bruno plan; Marina Dunes draft plan). Many plans charge development impact fees, with the proceeds used to protect habitat for imperiled species. *Id.* at 39, 81 (San Bruno plan imposes annual fees of $20 per residential dwelling unit and $10 per 1000 square feet of commercial office space; in Coachella Valley plan, initially $600 then $100 fee charged per acre developed in historic range of fringe-toed lizard). When a habitat conservation plan sets aside land for undisturbed habitat for a listed species, the land is often purchased, rather than regulated to prohibit conflicting private land uses, and significant federal funding has sometimes been provided. *Id.* at 34-35, 80, 180 (10% of remaining Coachella Valley fringe-toed lizard habitat acquired as preserves through federal land exchange and development impact fees; extensive federal appropriation for land purchases for Balcones Canyonlands National Wildlife Refuge).

The harm regulation has helped forge these positive strategies to protect endangered and threatened species, without wreaking havoc. The net result has been improved survival of imperiled species — the over-arching goal of the ESA. Although the harm regulation's detractors postulate a

parade of horrible consequences flowing from the regulation, in practice, few have materialized, as evidenced by the dearth of Fifth Amendment takings cases.

Striking down the harm regulation would throw habitat conservation planning into disarray, just when it is beginning to make significant progress. Throughout the country, private developers, federal and state regulators, local governments, environmental organizations, and others are working together to write habitat conservation plans that allow development to go forward profitably while protecting endangered and threatened species. More than 30 habitat conservation plans have been approved thus far and more than 100 are currently being developed. General Accounting Office, *supra*, at 9. Congress endorsed these efforts by giving the ESA a broad reach and by establishing the incidental take permit process.

It is the role of Congress, not the Courts, to evaluate this system of which the harm regulation is an integral part. The task is a weighty and quintessentially legislative one. Many species depend principally on nonfederal land. *See id.* at 5 (Table 1) (247 listed animal species have over 60% of their total habitat on nonfederal lands). The federal government may be incapable of preserving sufficient habitat for these species through federal activities and land acquisition alone. Therefore, limiting habitat conservation to these devices may result in extinction for many species. Twenty years ago, Congress set out to stem the tide of extinction. It is for Congress to decide whether to shift course.

## CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

Patti A. Goldman
*Counsel of Record*
Laura S. Ziemer
Todd D. True
Sierra Club Legal Defense Fund
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340

John F. Kostyack
National Wildlife Federation
1400 16th Street, N.W.
Washington, D.C. 20036
(202) 797-6879

February 1995

*Attorneys for Amici Curiae*